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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re Marriage of MELAHAT and  
UMRAN UZUMCU.

B201008

MELAHAT UZUMCU,

(Los Angeles County  
Super. Ct. No. BD296901)

Appellant,

v.

PACIFIC LAND CORPORATION et al.,

Respondents.

APPEAL from a judgment of the Superior Court of Los Angeles County.

Aviva K. Bobb, Judge. Affirmed.

Law Office of Burton Mark Senkfor and Burton Mark Senkfor for  
Appellant Melahat Uzumcu.

Spierer, Woodward, Corbalis & Goldberg, Stephen B. Goldberg and Peter  
Rustin for Respondents Pacific Land Corporation and Chris Fitzpatrick.

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## ***INTRODUCTION***

Appellant Melahat Uzumcu (“Melahat”) appeals from the summary judgment of the Los Angeles County Superior Court in favor of respondents Pacific Land Corporation and Chris Fitzpatrick, hereafter referred to as “Brokers,” unless context otherwise requires. The core issue is whether the trial court committed error in summarily adjudicating the Brokers were entitled to commissions as a result of the sale of a residence located in Los Angeles County.

During the dissolution proceedings between Melahat and Umran Uzumcu (“Umran”)<sup>1</sup> the trial court ordered that the family residence located at 605 Paseo del Mar, Palos Verdes Estates, California, was to be sold. This residence is referred to hereafter as “the home.”

The trial court made numerous orders, mostly pertaining to the sale of the home. Melahat wanted to stay in the home. Accordingly, Melahat was given a right of first refusal, which she was financially unable to exercise in her own right. Melahat’s brother, Nihat Kocarslan (“Nihat”) eventually came to her rescue by acquiring an interest in the home with Melahat as a tenant in common.

The trial court ruled that the Brokers were to be paid their full commissions. Melahat contends on appeal that the court erred in summarily adjudicating Brokers were entitled to their commissions because the commissions were not earned under the facts of this case.

As we hereafter point out, there are no triable issues of material fact. As a matter of law the Brokers earned their commissions. We accordingly affirm.

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<sup>1</sup> The parties to the dissolution proceedings are referred to in this opinion by their first names because they share a common last name. It is not out of disrespect that we employ this reference technique, but in the furtherance of clarity and convenience in drafting this opinion. (*Cruz v. Superior Court* (2004) 120 Cal.App.4th 175, 188, fn. 13.) We extend this rationale to include Nihat Kocarslan, Melahat’s brother, who will be referred to as “Nihat.”

## ***FACTUAL AND PROCEDURAL SYNOPSIS***

### ***September 20, 2004 Order.***

Umran filed an ex parte application with the court seeking authorization to execute a listing agreement on the home, as Umran was the only one on the title to the property.

On September 20, 2004, the trial court issued its order. The proposed order submitted by counsel for Umran was extensively interlineated, but contained the following provisions summarized as follows: Melahat was allowed to select a broker of her choice to co-list the property with the broker chosen by Umran, namely, Anna Randall of Coldwell Banker. Melahat selected Chris Fitzpatrick of Pacific Land Corporation to co-list the property; the initial listing price was to be \$6.995 million; total commissions were to be paid by the sellers at 5 percent; the listing period was fixed at six months commencing September 20, 2004; apparently motivated by Melahat's opposition to the sale, because Melahat wanted to remain on the property as the children of the marriage were still young, the trial court gave Melahat a right of first refusal in the following language: "Petitioner shall have a right to first refusal provided she meets all of the terms & conditions of a bonifide [sic] buyer and the full 5% commisn [sic] is paid to the brokers/agents."

Umran signed a listing agreement on October 10, 2004. The listing comported with the court's order dated September 20, 2004. The property was to be jointly listed with the broker representing Melahat, Pacific Land Corporation and Chris Fitzpatrick. Melahat was given a right of first refusal as set forth in the court's order of September 20, 2004.

Melahat's broker, Chris Fitzpatrick, obtained an offer from one Trent Merrill for \$6.8 million, dated March 1, 2005, which was acceptable to Umran but not to Melahat.

### ***May 4, 2005 Order.***

The parties once again appeared on Umran's ex parte application in the superior court pertaining to the sale of the home. On May 4, 2005, the court made the following order: "Having read the moving and responding papers and heard the argument of

counsel, the Court orders as follows: [¶] The purchase price of \$6,800,000 pursuant to the residential purchase contract dated March 1, 2005 for the property located at 605 Paseo del Mar, Palos Verdes Estates, California shall be and is hereby approved, subject to Petitioner’s right to exercise within 30 days of the signature of this order her right of first refusal.”

***July 21, 2005 Order.***

On June 2, 2005, Melahat filed her own application for ex parte orders pertaining to the sale of the home. The court issued an order and set the matter for further hearing on July 11, 2005. The parties appeared with counsel. The court heard evidence pertaining to numerous items about the value of jewelry and other personal items and also considered its prior orders pertaining to the sale of the home.<sup>2</sup> The matter was taken under submission and the court signed an extensive order on July 21, 2005, entitled “Further Order After Hearing On Petitioner’s Order To Show Cause For Orders Pertaining To The Sale Of The Family Residence Filed on June 2, 2005.”

The relevant portions of the order of the trial court dated July 21, 2005, pertaining to the issues of the Brokers’ commissions in this appeal are found in the court’s order as follows: “F. Petitioner’s right of first refusal with regard to the sale of the residence is hereby extended to August 4, 2005. Petitioner shall not be entitled to exercise her right of first refusal to purchase Respondent’s interest in the residence unless she [specifies deposits to be made in accordance with paragraph E of the order] or obtains a further Order of Court. . . . [¶] (1) The value of the residence is deemed to be \$6,800,000 based upon Respondent’s conduct of conditionally accepting an offer in that amount, and the Court having issued an Order on May 4, 2005, at Respondent’s request, conditionally approving that sale subject to Petitioner’s right of first refusal. [¶][¶] (3) The commission due to the real estate brokers in the event that Petitioner exercises her right

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<sup>2</sup> Our prior unpublished opinion provides a factual background of the extensive issues involving the dissolution of the marriage of the Uzumcus. (*In re Marriage of Uzumcu* (Dec. 17, 2007, B183929, B187085, mod. Jan. 16, 2008) [nonpub. opn.] )

of first refusal is \$340,000. . . . [¶][¶] [5]e. Should Petitioner elect to exercise her right of first refusal and ‘buy out’ Respondent’s interest in the family residence, Petitioner will have to pay to Respondent the sum of [spelling out the net amount Petitioner is obligated to pay considering offsets, etc. stated in the order and making provision for adjustments up or down considering tax liabilities, etc.], and Petitioner will in addition have to pay the \$340,000 commission due to the real estate brokers . . . .” The court then set a further hearing for August 4, 2005.

Melahat allegedly actively pursued the exercise of right of first refusal, but ran out of time. The circumstance then led to another ex parte hearing on September 21, 2005.

***September 21, 2005 Order.***

On September 21, 2005, yet another ex parte order was sought in the superior court. Melahat filed a document entitled “Order On Petitioner’s Ex Parte Order To Show Cause For An Order Extending The Date For Close Of Escrow To October 11, 2005.”

Again, in an extensively delineated proposed order submitted by Melahat’s counsel, the court signed an order which provides in relevant part: “Due to the Court’s unavailability to hear this matter sooner, the date for the close of escrow with regard to Petitioner’s exercise of her right of first refusal with regard to the sale of the family residence located at 605 Paseo Del Mar, Palos Verdes Estates, which was previously extended to September 23, 2005 in the Court’s Order filed on September 1, 2005, [ ] is hereby extended by stipulation of counsel to September 27, 2005 at 3:00 pm or September 29, 2005 at 3:00 pm, which date shall be selected by the court in its sole discretion for hearing of the three Ex Parte Applications filed herein on September 21, 2005.”

***October 20, 2005 Order.***

On October 11, 2005, the court was confronted with yet another ex parte petition filed by Melahat. The matter was heard, both Melahat and Umran were present and represented by their respective counsel. The brokers for Melahat appeared through their counsel for the purpose of filing an “Ex Parte Application for Leave to Intervene and for Order for Payment of Commissions.” The matter was submitted and subsequently, on

October 20, 2005, signed an order entitled “Order After Hearing Of October 11, 2005 Regarding Multiple Matters Filed By Both Parties; And Regarding Ex Parte Request For Leave To Intervene Filed By Pacific Land Corporation And Chris Fitzpatrick.” The relevant portions of the order pertaining to broker commissions issues are set forth *verbatim* as follows:

“The Court, having read and considered the pleadings and evidence filed and submitted by counsel for Petitioner and Respondent, and by Stephen B. Goldberg, counsel for the Interveners, as well the argument of counsel, and good cause appearing therefor, hereby orders as follows on each of the matters that was on the Court’s calendar for October 11, 2005: . . .

“E. Petitioner’s Ex Parte Order to Show Cause for an Order Extending the Date for Close of Escrow re Petitioner’s Right of First Refusal to Buy Out Respondent’s Interest in the Family Residence, filed on September 29, 2005

“1. The Court denies Petitioner’s request for an order further extending the date for close of escrow with regard to Petitioner’s exercise of her right of first refusal to buy out Respondent’s interest in the family residence located at 605 Paseo Del Mar, Palos Verdes Estates, California (hereinafter ‘family residence’), the conditions for which ‘buy out’ are provided for in the Court’s prior Orders filed on September 20, 2004, August 4, 2004, in the Further Judgment After Trial by Court of Reserved Issues entered on April 15, 2005, and in the Orders filed on May 4, 2005, June 2, 2005, July 21, 2005, July 27, 2005, August 25, 2005, August 31, 2005, September 1, 2005 and September 29, 2005.

“2. Petitioner may proceed with the exercise of her right to buy out Respondent’s interest in the family residence, provided that Petitioner closes escrow prior to Respondent’s closing the pending escrow with West Coast Escrow in which Trent Miller is the buyer. Respondent may proceed with the pending sale of the family residence to Trent Miller, provided that Respondent and Trent Miller close escrow prior to the close of escrow on Petitioner’s buy out of Respondent’s interest in the family residence. [¶¶]

“7. The Court hereby approves the two alternative Escrow Instructions which are attached to this Order, each page of which bears the Court’s signature, and the Court

hereby directs that such Escrow Instructions shall be complied with by the first of the escrow holders that is able to finalize the alternative escrow transactions provided or herein. . . .

“8. The attached Escrow Instructions are predicated upon the following findings:

“a. The ‘purchase price’ of the residence is \$6,800,000, . . . [¶¶]

“d. Each of the parties is responsible for paying one-half of the commission due on the sale of the property, . . . [¶¶]

“F. Ex Parte Application of Pacific Land Corporation and Chris Fitzpatrick for Leave to Intervene and for Order for Payment of Commissions

“1. The Court hereby grants the Ex Parte Application of Pacific Land Corporation and Chris Fitzpatrick for leave to intervene and to file a complaint in intervention in the above-captioned marital dissolution action.

“2. In the event that the family residence is sold to Trent Merrill, the entire \$340,000 commission, one-quarter of which (\$85,000) is allegedly due to Coldwell Banker and Anna Randall, as the listing brokers for Respondent, and three-quarters of which (\$255,000) is allegedly due to Pacific Land Corporation and Chris Fitzpatrick, as the listing broker for Petitioner and as the broker for the prospective buyer, Trent Merrill, shall be paid through escrow.

“3. In view of Petitioner’s contentions and allegations against Coldwell Banker, Anna Randall, Pacific Land Corporation and Chris Fitzpatrick, which include but are not limited to Petitioner’s contention that said persons and entities have failed to properly perform and are not entitled to the payment of any commission in connection with Petitioner’s exercise of her right of first refusal to buy out Respondent’s interest in the family residence, in the event that Petitioner is able to finalize and close escrow on her buy out of Respondent’s interest in the family residence, one-half of the \$340,000 commission (\$170,000) shall be paid on Respondent’s behalf to Coldwell Banker, Anna Randall, Pacific Land Corporation and Chris Fitzpatrick as his share of the community’s obligation to said persons and entities, and shall be held in escrow pending written agreement between Anna Randall of Coldwell Banker, and Chris Fitzpatrick of Pacific

Land Corporation or further Order of the Court, and the other half of said commission (\$170,000) shall be held in escrow pending written agreement between Petitioner, Anna Randall of Coldwell Banker, and Chris Fitzpatrick of Pacific Land Corporation or further Order of the Court.”

***October 27, 2005 Order.***

On October 27, 2008, the ex parte application of Brokers for clarification of the court order filed on October 20, 2005, came on for hearing. Melahat and Brokers appeared telephonically through their respective counsel. Umran informed the court through his counsel that Umran declined to have his counsel participate in the matter. On October 27, 2005, the court made its order entitled “Order On Interveners’ Ex Parte Application For Clarification Of Court Order Filed October 20, 2005 And Escrow Instructions.” In relevant part, the order stated: “Petitioner, Melahat Uzumcu shall have until 11/4/05 to close escrow on her refinance of the subject property located at 605 Paseo Del Mar, Palos Verdes Estates, California. The Inteverners, Trent Merrill, Respondent, and their agents and representatives are hereby restrained from making any further efforts to close escrow on the purchase of the property by any person other than Petitioner, and they shall not record or cause to be recorded any deeds or liens of any nature on the property, nor interfere in any way with Petitioner’s closing of escrow in connection with her refinance and buy out of Respondent’s interest in the property, provided that Petitioner proceeds in accordance with the Court’s prior Orders. If escrow has not closed by 11/4/05, then Trent Merrill shall have until 11/14/05 to close escrow on the subject property and Petitioner will be restrained from closing escrow after 11/4/05 through 11/14/05.”

Melahat was able to close successfully and Melahat and Nihat took title as 57 percent and 43 percent as tenants in common. A grant deed recorded November 4, 2005, as Document No. 05-2672069, transferred the home from Umran to Melahat, an unmarried woman, as her sole and separate property, a 57 percent interest, and Nihat, a single man as his sole and separate property, a 43 percent interest, as tenants in common.



***Summary Judgment For Brokers on May 29, 2007.***

On April 17, 2007, the court heard Brokers' motion for summary judgment wherein Broker requested that \$170,000, which had been placed aside in escrow, be awarded to Brokers. The court took the matter under submission and by minute order dated May 29, 2007, the court ruled in relevant part that the Brokers' motion for summary judgment was granted, responding party's evidentiary objections were overruled and summary judgment was signed and filed.

"Summary Judgment" was signed and filed on May 29, 2007, which provided in relevant part: "Having considered all the evidence set forth in the papers submitted and the inferences reasonably deducible therefrom, except that to which objection was sustained, the Court determines that Realtors are entitled to judgment in their favor as a matter of law, for the following reasons: [¶] 1. There is no triable issue as to any material fact; and [¶] 2. Realtors, in support of their motion, proffered evidence that established that the Orders of this Court, and the undisputed facts, entitled Realtors to collect their commission in the amount of \$170,000.00. [¶] IT IS ORDERED, ADJUDGED, AND DECREED that the motion of Realtors for summary judgment be, and hereby is granted. [¶] IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Melahat Uzumcu shall take nothing, and that Realtors shall recover from Melahat Uzumcu reasonable attorney's fees and the costs of suit in the sum of \_\_\_\_."

***Melahat's timely notice of appeal filed on July 30, 2007.***

Following Brokers' "Notice Of Entry Of Summary Judgement" on June 6, 2007, subsequently filed with the court on June 8, 2007, Melahat filed a timely notice of appeal on July 30, 2007.

***DISCUSSION***

***Standard of Review.***

Melahat does not discuss the standard of review in her appellant's opening brief or in her reply brief. Brokers do discuss the standard of review, but only in general terms

and in a manner that is weighted in their favor, albeit accurately as far as it goes. Brokers maintain that the California courts have often held that “[t]he policy underlying motions for summary judgment and summary adjudication of issues is to ‘promote and protect the administration of justice, and to expedite litigation by elimination of needless trials’” citing *Cole v. California Insurance Guarantee Association* (2004) 122 Cal.App.4th 552, 556 for the principle. Brokers further maintain that summary judgment provides courts “with a mechanism to cut through the parties’ pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute,” citing *Kashani v. Tsann Kuen China Enterprise Co., Ltd.* (2004) 118 Cal.App.4th 531, 540 for this general principle. Going further, Brokers state that on appeal, the appellate court independently reviews the correctness of the trial court’s ruling so as to determine whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. We hold that these general principles are accurately advanced by Brokers as general principles involved in deciding this appeal. We briefly supplement these general principles with the observation that in searching the record for genuine triable issues of material fact, strict construction is applied to the declarations submitted by the moving party for summary judgment and a liberal construction is applied to the declarations submitted in opposition to the motion for summary judgment. These principles of construction pertaining to summary judgments are established to demonstrate the preference of California courts for a trial on the merits if applicable. The use of the constructions aforementioned are well ensconced in the law applicable to summary judgments in California and do not require reference to further statutory or decisional law at this point. In a word, a de novo review is used by this court in determining whether the judgment of the trial court is free of reversible error.

#### ***Computation of Commissions.***

Melahat first contends that the brokers were not entitled to a commission because her brother Nihat acquired his interest in the property for approximately \$3 million. Melahat reasons from this fact that the broker’s commissions were accordingly rendered nugatory. We find this reasoning to be specious at best. It is indelibly clear from the

many rulings and orders of the trial court that the property was intended to be sold to a third party, namely Trent Merrill, in this instance. The trial court was lenient in extending the date of expiration of Melahat's right of first refusal in keeping with her desire to keep the family home and to maintain the remaining family in tact. The trial court is to be commended in showing patience and compassion for Melahat in this quest. Nothing in the court's orders, however, indicate even a slight alteration of the court's intention that the brokers were to be paid their commissions upon acquiring a qualified buyer pursuant to the terms of the listing agreement and escrow instructions. It is beyond dispute that the sales price was to be \$6.8 million after the court adjusted the sales price downward upon receipt of evidence of a slightly lower offer than the original listing price which Umran was willing to accept. The mathematical calculation of the 5 percent brokers' commission becomes elementary at this point. Five percent of \$6.8 million is \$340,000. It is also abundantly clear from the ruling of the trial court that the commissions of the brokers were to be paid by Melahat regardless of whether she was able to exercise her right of first refusal. This court does not discern that the trial court intended that the fortuitous appearance of Nihat on the scene to assist his sister in exercising her right of first refusal by taking a tenancy in common interest with her in the property altered the basis intention of the trial court to have Melahat bear the costs of the brokers' commission as outlined *supra* in this opinion. We find Melahat's argument to the contrary to be disingenuous. The fact that Melahat's exercise of her first refusal rights was perfected by her through the assistance and agency of Nihat does not alter our opinion on this issue.

***Effect of listing agreement expiration date.***<sup>3</sup>

Melahat next contends that because a buyer was not produced during the original six-month listing period who was ready, willing and able to purchase the property, no commissions were earned and payable. The contention is devoid of merit.

Initially, we access the “Residential Listing Agreement” itself. In paragraph 4.A. the parties have provided as follows: “A. Seller agrees to pay to Broker as compensation for services irrespective of agency relationship(s), . . . [x] 5.000 percent of the listing price (or if a purchase agreement is entered into, of the purchase price), . . . as follows: [¶] (1) If Broker, Seller, cooperating broker or any other person procures a buyer(s) who offers to purchase the Property on the above price and terms, or on any price and terms acceptable to Seller during the Listing Period, or any extension.” This provision is clear on its face and requires that a buyer be produced within the listing period to entitle the broker to a commission. The record is clear that Melahat’s broker, Chris Fitzpatrick, obtained an offer from Trent Merrill for \$6.8 million dated March 1, 2005, which was acceptable to Umran but not to Melahat, as previously discussed, *supra*, under the subheading “September 20, 2004 Order” of the “Factual and Procedural Synopsis” heading of this opinion. Merrill’s offer is undisputably within the six-month original listing agreement period.

To the extent Melahat may be implying that escrow must also close within the six-month listing period, we see nothing in the listing agreement signed by the parties to require or even suggest that the brokers must also *close escrow* during the listing period to be entitled to a broker’s commission. We are unwilling to insert such a provision in the agreement and reject Melahat’s veiled invitation for this court to do so. We are further constrained to note that it was Melahat who asked the court for an extension of the original six-month listing period in order to perfect her court-ordered right of first refusal.

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<sup>3</sup> The date of March 20, 2004, as the expiration date of the initial listing period is clearly in error and neither party to the agreement contends otherwise. The correct date should be March 20, 2005.

Secondly, California decisions have recognized that a broker's right to a commission is not dependent upon the day escrow closes. (*Leonard v. Fallas* (1959) 51 Cal.2d 649.)

Melahat's second contention on appeal lacks merit and we so hold.

***Co-broker as a necessary party.***

Melahat claims that the failure of the co-broker, Anna Randall of Coldwell Banker, to be made a party to the litigation exposed her and Umran to the risk of having to suffer the risk of double, multiple or inconsistent obligations. The truth is to be found otherwise in the documentation filed in support of the motion for summary judgment. On April 12, 2007, Anna Randall filed her declaration entitled "Declaration of Anna Randall In Support of Intervenor's Motion for Summary Judgment." Among other things, Anna Randall, on behalf of herself and Coldwell Banker, declared: "3. By Listing Agreement signed on October 10, 2004, my office co-listed the subject real property with Pacific Land Corporation, through Chris Fitzpatrick. [¶] 4. I am aware of the pending litigation, and have been kept apprised of developments in this lawsuit through counsel and through Chris Fitzpatrick. [¶] 5. I support Intervenor's Motion for Summary Judgment, and Coldwell Banker will make no further claims for commission outside of the pending lawsuit. [¶] 6. For this reason, I do not believe that it is necessary that I or Coldwell Banker be named as a party in this action, because I am confident that when Intervenor's succeed, they will share their commission with my office."

Melahat's claim of theoretical double exposure is nonexistent as a practical matter. Melahat's claim is esoteric and rarified and theoretical in the extreme.

***The Statute of Frauds.***

Melahat correctly observes that she did not sign the listing agreement. However, this court observes it was not necessary that she do so. Referring to the trial court's order of September 20, 2004, Umran was empowered to execute the listing agreement which he indisputedly did. The relevant portion of the court's order is quoted *supra* in this opinion. The listing agreement itself contains a statement Umran was authorized to

execute the listing agreement. The addendum to the listing agreement states in relevant part: “PER COURT ORDER DATED SEPTEMBER 20, 2004: [¶] 1. UMRAN UZUMCU IS AUTHORIZED TO EXECUTE THE LISTING AGREEMENT.” Because he was the only one on title, Umran in fact executed the listing agreement. None of the parties to this litigation contend otherwise. The statute of frauds has no relevance to this litigation and we so hold.

***DISPOSITION***

The judgment is affirmed. Respondents to recover costs of appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

**WOODS, J.**

**We concur:**

**PERLUSS, P.J.**

**ZELON, J.**